No. 6161

In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
GEORGE E. REED,
Alleged Bankrupt.

GEORGE E. REED, Bankrupt-Appellant,

vs.

GILBERT L. THORNTON, et al,
Petitioning Creditors-Appellees.

Appellees' Brief

On appeal from decree adjudicating Geo. E. Reed a bankrupt and entered in United States District Court for the District of Oregon.

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Attorney for Appellees.
OREN R. RICHARDS,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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STATEMENT OF FACTS

On and prior to May 31, 1929, the alleged bankrupt was engaged in the building business in the City of Portland. He had erected several large apartment houses shortly prior to that date and became heavily indebted. On May 21, 1929, he organized a corporation by the name of Portland Building & Investment

Company (Creditors' Exhibit 5), the incorporators being the alleged bankrupt, Grace H. Reed, his wife, George W. Bednar and Thomas A. Lovelace, both carpenters working for the alleged bankrupt, and H. F. Hokamp, a personal friend of Reed who was a real estate broker and who negotiated the purchase of some of the lots on which the apartment buildings were built. The capital stock of the corporation was fifyt thousand (50,000) shares of the par value of Ten Dollars ($10.00) per share; 25,710 shares were issued at the time of the incorporation, as follows:

George E. Reed	25,100	shares
Grace H. Reed	10	"
H. F. Hokamp	50	"
Thomas A. Lovelace	300	"
George W. Bednar	200	"
Oren R. Richards (Bnkpts. atty.)	50	"
Total	25,710	"

Reed nominally paid for his shares by conveying to the corporation at that time real estate consisting of three large apartment houses (Creditors' Exhibit 4). These three apartment buildings were conveyed to the corporation on May 31, 1929, and the deeds were recorded June 6, 1929. (Petitioning Creditors' Exhibits 32, 33 and 34).

These three deeds, although made to the corporation, were all endorsed for return to George E. Reed

and were returned to him after they were recorded.

One of these apartment houses, to-wit, located on Lots 7 and 8, Block 22, Hawthorne's First Addition to the City of Portland, was thereafter conveyed to Oren R. Richards, Bankrupt's attorney. The date of the conveyance appears to be September 1, 1929, although the original deed, which is in evidence, shows erasures both of the date of execution and the date of acknowledgment.

This particular property, while not the most valuable of the three, represented the most valuable asset for the reason that it was at the time of the conveyance clear of all incumbrance except the first mortgage; whereas the other two apartment houses, in addition to having first mortgages, were each incumbered with mechanic's liens in excess of $20,000.00.

The consideration which Richards claims to have paid for this apartment house was a conveyance of a piece of land having an assessed valuation of $1,000.00, rough, hilly and the timber on it is of no commercial value. (Petitioning Credits' Exhibit 39, Certificate of County Assessor of Curry County). Oren Richards, who received this conveyance, is the attorney for the bankrupt, was the attorney who organized the corporation for the bankrupt, had charge of all of the matters resulting in the formation of the corporation and the subsequent transfers, and was familiar

with the condition of Reed's affairs.

Another of the three apartment houses was conveyed by the corporation to Mary I. Lovelace (Petitioning Creditors' Exhibit 29), the mother of Thomas A. Lovelace, carpenter in the employ of the alleged bankrupt. This property was a very large apartment house on land 100x100, with a three-story apartment house containing about twenty-five apartments. The alleged consideration for this transfer was a conveyance of a piece of land in Clackamas County, Oregon, containing 14 acres, which had an assessed valuation of $1,040.00, and was conveyed to the corporation by Mary I. Lovelace, subject to a life estate therein.

On July 20th the alleged bankrupt conveyed to Luby Hargrove the real property known as Lot 25, Block 1, Flander's Park Addition in the City of Portland. This property was the residence of the bankrupt, was built by the bankrupt himself, was used and occupied by him and his family from the time it was built, and they continued to occupy the same after the alleged conveyance to Hargrove, and were in possession and occupation of the property at the time of the hearing before the special master. There had never been any change of possession. The consideration alleged to have been paid for this conveyance was the sum of $250.00, claimed to have been paid over in cash. No checks were produced and no evi-

dence in corroboration of the alleged payment of $250.00 cash was produced.

The deed to Hargrove was recorded by Reed himself and returned to Reed after it was recorded. After the deed was returned Reed's address was erased from the endorsement but the photostatic copy in the County Clerk's office shows Reed's address on the back of the deed. **The erasure from the original deed was made after the deed was returned and the erasure was obviously made for the purpose of eliminating the evidence of the return of the deed to Reed.**

On July 20, 1929, the allgeed bankrupt conveyed to Thomas A. Lovelace Lot 1, Block 11, Granville Park, within the corporate limits of the City of Portland. The grantee was a carpenter in the employ of the alleged bankrupt, and the son of Mary I. Lovelace. The alleged consideration for this conveyance was likewise a payment of $300.00 in cash, but no corroborative evidence of the cash payment was introduced. This cash payment was made notwithstanding the claim of Thomas A. Lovelace that the alleg.ed bankrupt was indebted to him in a large sum of money, something in the neighborhood of $2,000.00 or $3,000.00. This deed was likewise recorded by George E. Reed and returned to him.

On July 20, 1929, the alleged bankrupt conveyed to George H. Bednar real property known as the

West 26 feet of Lot Numbered 11, in Block Numbered 9, Holliday Park Addition, in the City of Portland, for an alleged cash consideration of $300.00. No corroborative evidence of the payment of this money was offered. Bednar is a young man who is a carpenter in the employ of George E. Reed, and lives with Mrs. Lovelace. This deed was likewise recorded by and returned to the alleged bankrupt.

All of these conveyances were made within a period of four months preceding the filing of the involuntary petition in bankruptcy. **The earliest conveyance was made May 31, 1929, and the involuntary petition in bankruptcy was filed September 29, 1929.**

The alleged bankrupt testified that the corporation was organized to take over the apartment properties (Page 4 of Reed's Testimony in Statement of Evidence).

> "The assets were turned over to form the capital stock of the corporation. Bednar and Lovelace have been in my employ as carpenters for several years. Bednar lives with Mrs. Lovelace, who is the mother of Thomas A. Lovelace."

He further testified:

> "The property described (meaning the conveyance of the six parcels of real property referred to above) **accounts for all the property I had any interest in in May at the time the corporation was**

organized. The home at 75 East 45th Street was deeded to Luby Hargrove, a real estate broker. I bought a Buick automobile about 1928 for $950.00. It has all been paid off. I transferred title to the automobile to Thomas A. Lovelace. I sold it to him for $60.00 July 20th, two days after the action was brought against me.

Q. You have the automobile in your possession.

A. I have, you bet.

Q. You have had it ever since you sold it, have you not?

A. Yes, part of the time.

Q. Have you had it all the time?

A. Yes, I have.

Q. Did you have any property left after you deeded parcels away that we have described?

A. No, that is all we had. After I sold that property, that was all we had.

I paid for all of the expenses incident to the formation of the corporation Portland Building & Investment Company. I engaged Oren Richards to organize the corporation. Of the six deeds I personally took three of them to the county Clerk's office to be recorded, and possibly I took the others. On the back of the deeds notations were made that they were to be returned to me. The clerk made the notation. I gave him the

address. The deeds were returned to me. I did not erase the address from the back of the deeds."

He further testified that he sold the stock issued to him, one-third of it to Thomas A. Lovelace for $250.00 in cash, one-third to Mary I. Lovelace for $200.00, and one-third to Mrs. McLane for $250.00. In other words he disposed of 25,100 shares of stock for $700.00, which stock was represented to have a value of $251,000.00. (See petitioning Credits' Exhibit 4, Subscription to Capital Stock), and which represented practically the entire value of all of the property conveyed to the corporation. He did not deposit the money in the bank, although he had a bank account. He was the president of the corporation from the time of its organization to the time of the bankruptcy proceedings. **He remained the president notwithstanding the fact that he had disposed of all of the stock except two shares.**

He further testified:

He was then questioned regarding his books of account and he testified as follows:

"As an officer of the corporation and President of it **I transferred the building at 31st and Burnside to my lawyer, Mr. Richards. * * * I was responsible for the sale of it. * * ***

"I never saw the piece of timber land Mr.

Richards traded for the property. I never saw a cruise of it. Mr. Richard's brother told me the assessed valuation was around $2,000.00."

* * * * * *

(Referring to the building which was deeded to Mr. Richards) he said:

"It was the only building that was free of liens."

"Q. Where are the books of account that had to do with the operations in the construction of these three aparment houses?

A. I have not got any books.

Q. Where are they?

A. I have not got any at all.

Q. Where are they?

A. I burned them.

Q. When?

A. At the time I formed that corporation or shortly afterwards.

Q. Have you any of the bills?

A. I have nothing. I burned them. I burned everything pertaining to the accounts up to the time this corporation was formed, check books, everything. At the time I burned the books liens were being filed against the buildings. I was a party to these lien notices. They were for debts incurred in the construction of the buildings."

Mr. Richards testified that the timber claim which he deeded to the corporation for the apartment house had never been cruised and didn't know whether the Portland Building & Investment Company made any investigation. He gave no statement as to how much timber was on the land and they didn't inquire.

After the apartment houses were transferred to the corporation and later transferred to Richards and one to Mary I. Lovelace, Thomas A. Lovelace nominally kept the books and records of the corporation and had charge of the receipts and expenditures, but it appeared very clearly that that was a subterfuge purely. The bank account was carried in the name of Thomas A. Lovelace, but the record of the bank account shows that it was used primarily for George E. Reed. Checks were issued out of that account direct to Reed, but instead of entering Reed's name, young Lovelace attempted to disguse the entry by inserting initials and reversing them. That is to say, that instead of writing "G. E. R." he made entries on the stub record "R. E. G.," but finally admitted that he referred to George E. Reed. This account also shows that notwithstanding Reed's claim that the residence had been sold to Hargrove, Lovelace was paying out of the corporation account interest and other charges in connection with this residence. It also discloses that young Lovelace was paying out of the corporation account operation bills on the property which had been deeded to Mary I. Lovelace. In other words,

this one account which was carried by Thomas A. Lovelace for the corporation was in reality being used as a makeshift to conceal Reed's personal operations.

In fact Mrs. Reed admitted in a letter which she wrote to Mrs. Lucius (Petitioning Creditors' Exhibit 14) that the Reeds were the owners of the building:

> "We have our apartments practically 100% full."

This was written after the alleged transfer.

Reference to the following items in Creditors' Exhibit 25 clearly shows that the account was kept by Lovelace for Reed.

In this account the apartment houses are referred to by name. The Laurel Manor is the building that had been conveyed to Richards, Reed's attorney.

The Regal Manor is the one that remained in the name of the corporation.

The Castle Manor is the one conveyed to Mary I. Lovelace.

The court will notice a large number of checks issued to R. E. G. These are all to Reed personally out of the corporation account.

On November 9th, item No. 89, there is a check

to City Mortgage Company for $165.00. This represented interest on the mortgage on the Reed residence, paid out of the corporation funds, notwithstanding the fact that it was supposed to belong and was conveyed to Luby Hargrove.

All of the Halsey Street items cover the building which had been conveyed to Mary I. Lovelace, and she was supposed to be the owner of it. Nevertheless, disbursements are made on account of that building from this so-called corporation account carried on by Thomas A. Lovelace.

These are but a few of the items in the account indicating that this account was in reality being carried by Lovelace for the benefit of George E. Reed, who was the acutal owner of the various properties.

The special master, to whom the court referred the issues raised by the involuntary petition, intervening petitions, and the answers thereto, made findings of fact and conclusions of law. He found as a fact that Reed was insolvent; that each of the petitioning creditors and intervening creditors had provable claims which in the aggregate exceeded $500.00; that the alleged bankrupt, within four months preceding the date of the involuntary petition, committed an act of bankruptcy in that he conveyed, transferred, concealed and removed, and permitted to be concealed and removed, with intent to hinder, delay and defraud

his creditors, the various properties referred to therein, being the six parcels of real property specifically described. (Finding of Fact No. 8.)

In Finding No. 9, he finds as a fact that every conveyance was made without any consideration, pursuant to a scheme or device to alienate the property and place the same beyond the reach of creditors; that he was indebted to a large number of creditors for labor and material in a sum in excess of $25,000.00 and was liable to the Commercial Casualty Company on an indemnity agreement signed when the surety company issued its bond on behalf of the bankrupt; that the corporation, Portland Building & Investment Company, was in truth and in fact the alter ego of George E. Reed; that Reed caused the corporation to convey the real property at 31st and Burnside Streets to Oren Richards, his attorney; that notwithstanding the conveyances Reed is in active possession and control of the various properties and that the transferees are acting as agents for the bankrupt.

He further finds as a fact that the alleged bankrupt has failed to establish any of the allegations of his affirmative answer.

In Finding No. 13, he specifically finds that in those instances in which the petitioning creditors were assignees that the assignments were taken in good faith and not for any unlawful or oppressive purpose;

that there was no collusion, but all proceedings were taken in a bona fide effort to prevent the perpetration of fraud on the part of the alleged bankrupt and for the purpose of recovering for the benefit of the creditors the property which had been fraudulently conveyed, to insure an equitable distribution of Reed's assets among all his creditors. Upon these findings of fact he recommended that an order of adjudication be entered.

The alleged bankrupt filed exceptions to the special master's report, which were heard by Honorable Robert S. Bean, District Judge, who overruled the exceptions and confirmed the special master's report and entered an order of adjudication from which this appeal is taken.

POINTS AND AUTHORITIES

Motion to Dismiss Appeal

THE APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE TRANSCRIPT AND RECORD WERE NOT FILED IN THE APPELLATE COURT AND THE CAUSE WAS NOT DOCKETED BY OR BEFORE THE RETURN DAY OF THE CITATION AS REQUIRED BY RULE XVI OF THE RULES OF THIS COURT, NOR HAS ANY ORDER BEEN ENTERED PRIOR TO THE EXPIRATION OF THE TIME

ENLARGING THE TIME WITHIN WHICH TO DO SO.

Rule XVI, Circuit Court of Appeals, Ninth Circuit.

Point I.

APPELLANT IS PRECLUDED FROM QUESTIONING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS OF FACT FOR THE REASON THAT HE HAS NOT BROUGHT TO THIS COURT ALL OF THE EVIDENCE INTRODUCED IN SUPPORT OF THE PETITIONER'S CASE.

Collier v. U. S., 173 U. S. 79.

Point II.

THERE ARE NO INTERVENING CREDITORS WHO BECAME SUCH BY ASSIGNMENT OF CLAIMS SUBSEQUENT TO THE FILING OF PETITION.

Levins v. Stark, 57 Ore. 189.
In re Miner, 117 Fed. 953, (Dist. Ct. of Ore.)
In re Miner, 114 Fed. 998, (Dist. Ct. of Ore.)

Point III.

THERE ARE NO PREFERRED CREDITORS AMONG THE ORIGINAL PETITIONERS OR

INTERVENORS.

11 U. S. C. A. 6107c, formerly § 67c Bky. Act.
In re Automatic Typewriter Co., 271 Fed. 1 (2nd Cir.).

Point IV.

A CREDITOR HOLDING AN UNLIQUIDATED CLAIM IS QUALIFIED TO ACT AS A PETITIONING CREDITOR, AND IT IS NOT NECESSARY THAT THE CLAIM SHOULD FIRST BE LIQUIDATED.

Grant Shoe Co. v. Laird Co., 212 U. S. 445.
Spear v. Gordon, 12 Fed. (2nd) 778, (1st Cir.).
In re Post, 12 Fed. (2nd) 941.

Point V.

PAYMENT TO PETITIONING CREDITORS SUBSEQUENT TO FILING OF THE INVOLUNTARY PETITION WILL NOT DISQUALIFY SUCH CREDITORS AND WILL NOT PRECLUDE AN ADJUDICATION IN BANKRUPTCY.

11 U. S. C. A., § 95g, formerly Section 59-g Bankruptcy Act.
11 U. S. C. A. § 94, formerly Section 58, Bankruptcy Act.
Ward v. Lowery, 295 Fed. 60 (5th Cir.).

In re Beddingfield, 96 Fed. 190 (U. S. D. C., Ga.).

In re San Jose Baking Co., 232 Fed. 200, (U. S. D. C., Northern District of California).

Point VI.

GENERAL ORDER NO. 5 DOES NOT PRECLUDE ASSIGNEES THORNTON AND CONLEY FROM BEING PETITIONING CREDITORS IN THIS CASE.

General Order No. 5.

Haviland v. Johnson, 70 Ore. 85.

French & Co. v. Haltenhoff, 73 Ore. 247.

Collins v. Heckart, 127 Ore. 43.

Levins v. Stark, 57 Ore. 189.

Hackett Digger v. Carlson, 127 Ore. 386.

11 U. S. C. A. § 53, formerly Section 30, Bankrupty Act.

Meek v. Centre Banking Co., 268 U. S. 426.

In re City Contracting & Bldg. Co., 30 A. B. R. 133.

Lowenstein v. McShane, 130 Fed. 1007.

Reports of American Bar Ass'n. 1925, p. 492.

11 U. S. C. A. § 95(b), formerly Section 59 (b), Bankruptcy Act.

11 U. S. C. A. § (9), formerly Section 1 (9), Bankruptcy Act.

11 U. C. C. A. § 1 (11), formerly Section 1 (11), Bankruptcy Act.

In re Bevins, 165 Fed. 434, (C. C. A., 2nd Cir.).

Re Page Motor Car Co., 251 Fed. 318.

In re Veller, 249 Fed. 633, (C. C. A., 6th Cir.)
Re Halsey El. Gen. Co., 163 Fed. 118.
Re Hanyan, 180 Fed. 498, affirmed 181 Fed. 1021.
Leighton v. Kennedy, 129 Fed. 737, (C. C. A., 1st Cir.).
In re Automatic Typewriter Co., 271 Fed. 1, (C. C. A., 2nd Cir.).

ARGUMENT

MOTION TO DISMISS APPEAL

THE APPEAL SHOULD BE DISMISSED FOR THE REASON THAT THE TRANSCRIPT AND RECORD WERE NOT FILED IN THE APPELLATE COURT AND THE CAUSE WAS NOT DOCKETED BY OR BEFORE THE RETURN DAY OF THE CITATION AS REQUIRED BY RULE XVI OF THE RULES OF THIS COURT, NOR HAS ANY ORDER BEEN ENTERED PRIOR TO THE EXPIRATION OF THE TIME ENLARGING THE TIME WITHIN WHICH TO DO SO.

The citation was issued March 5, 1930, and was returnable within thirty days thereafter. Hence the time within which to file the record and transcript expired on April 5, 1930. No order extending the time was entered in the United States District Court or in

the Court of Appeals at any time. The transcript was filed and the cause docketed on June 6, 1930, two months after the time had expired, and under Rule XVI of this court the appeal should be dismissed.

Point I.

APPELLANT IS PRECLUDED FROM QUESTIONING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE FINDINGS OF FACT FOR THE REASON THAT HE HAS NOT BROUGHT TO THIS COURT ALL OF THE EVIDENCE INTRODUCED IN SUPPORT OF THE PETITIONER'S CASE.

On page 14 of appellant's brief he challenges the sufficiency of the evidence in the following manner:

> "NO EVIDENCE OF ANY KIND TO SUSTAIN FINDINGS 11, 12, 13, 14, 15, 16, 17, 18 and 25.
>
> "Nothing to discuss. No evidence."

We are at a loss to know what this has reference to. The findings of fact of the special master contain fourteen numbered paragraphs. There are no findings of fact 15, 16, 17, 18 and 25. In any event, appellant is precluded from questioning the sufficiency of the evidence for the reason that the record before this court does not include all of the evidence introduced

upon the hearing in support of the petition. The narrative statement of the evidence is fragmentary. The original transcript of the evidence contains 270 pages of typewritten record which together with the large volume of exhibits consisting of many books and records in addition to those referred to in the transcript before the court, dealt with questions of fact presented by the petition and answered thereto.

The court below did not certify the statement of the evidence to be a statement of all of the evidence introduced upon the trial of the issues. The brief excerpts of testimony presented to this court are sufficient only insofar as they present the questions of law that were passed upon in the court below. In the absence of a complete statement of all of the evidence we understand the rule to be that this court cannot and will not pass upon the question as to the sufficiency of the evidence to support the findings of fact.

Collier v. U. S., 173 U. S. 79.

Part II.

THERE ARE NO INTERVENING CREDITORS WHO BECAME SUCH BY ASSIGNMENT OF CLAIMS SUBSEQUENT TO THE FILING OF PETITION.

The only intervening creditors in this case are

Cress & Company and Commercial Casualty Insurance Company. Neither of these creditors are assignees. They are both original owners of their own claims. It is claimed that Thornton, assignee of W. W. Lucius, obtained an assignment of the claim after the filing of the original petition, but the record clearly establishes the facts to be to the contrary. The special master, in Finding No. 5, finds that the assignment of the claim from Lucius to Thornton was prior to the filing of the original petition in bankruptcy. The record also clearly establishes, and it is admitted by the alleged bankrupt that Thornton as assignee sued on this very claim in the state court before the petition in bankruptcy was filed. The record clearly establishes that Lucius assigned his claim to Thornton by oral assignment prior to July 16, 1929, for on that date Thornton, as assignee, commenced the action in the state court. The petition in bankruptcy was not filed until September 29, 1929. The written assignment was made on October 31, 1929, but was made "to confirm the oral assignment of the above described claim made by me to Mr. Thornton on or about the first day of July 1, 1929." (See Exhibit "A" attached to amended involuntary petition, affidavit of Gilbert L. Thornton, and affidavit of W. W. Lucius attached to amended involuntary petition.)

Under the law of the State of Oregon an oral assignment of a chose in action is valid and enforcible.

Levins v. Stark, 57 Ore. 189.

In re Miner, 117 Fed. 953, (District Court of Oregon), Judge Bellinger held:

> "The form of assignment of a claim is immaterial, and the proof of claim need only be such as will estop the assignor from making the same claim."

In re Miner, 114 Fed. 998, Judge Bellinger held proof of an assignment need not be in any particular form, that it **may be oral,** and that a subsequent written certificate may be evidence of an assignment.

In this case both the assignor and assignee admit on the record that the assignment was made prior to the filing of the petition in bankruptcy, and it is confirmed by the record fact that an action on the assigned claim was actually brought by Thornton almost four months prior to the filing of the involuntary petition in bankruptcy, hence Thornton did not become a creditor by assignment subsequent to the filing of the involuntary petition.

Point III.

THERE ARE NO PREFERRED CREDITORS AMONG THE ORIGINAL PETITIONERS OR INTERVENORS.

It is contended that Thornton is a preferred creditor because he instituted an action against the alleged bankrupt in the state court, as assignee of W. W. Lucius, and in said action attached property of the alleged bankrupt, and that this attachment was within the four months preceding the filing of the involuntary petition.

Thornton became a petitioning creditor, and even if he had attached the property of the alleged bankrupt, as it is claimed, within four months preceding the filing of the involuntary petition, the very act of filing the involuntary petition had for its object the annulment of that lien, and hence he could not be in any sense a preferred creditor. This is not a case where the creditor had attached and reduced his claim to judgment and sold the property upon execution and satisfied his claim in part within the four months' period. The facts are that Thornton brought the action in the state court on the claim assigned to him by W. W. Lucius within the four months' period, and in said action caused an attachment to be issued, but as soon as that was done he discovered that the alleged bankrupt had conveyed all of his property in fraud of his creditors and for that reason abandoned the action in the state court and joined with other creditors in the involuntary petition.

Section 67c of the Bankruptcy Act, now 11 U. S. C. A. § 107c, invalidates every lien by legal proceed-

ings, including attachment within four months before the filing of the petition, and hence when Thornton became a petitioning creditor he, in legal contemplation, requested the court to invalidate the lien that he had obtained by adjuding the debtor a bankrupt, and that is clearly a surrender of his preference, if it can be called such.

The record in this case, however, does not even disclose that any property was in fact attached, and in the absence of such showing there is no foundation for the contention that Thornton had obtained a preference.

In re Automatic Typewriter Co., 271 Fed. 1 (2nd Cir.), the precise question was raised. The court held:

> "A creditor who, in good faith, obtains an attachment against a debtor's property within four months of the filing of a petition in bankruptcy, may join in the petition to have the debtor adjudicated an involuntary bankrupt. Stevens v. Nave-McCord Mercantile Co. (C. C. A., 8th Cir.), 17 Am. B. R. 609, 150 Fed. 71; In re Hornstein (D. C., N. Y.), 10 Am. B. R. 308, 315, 122 Fed. 266. And this although the attachment has not been formally released. The court has the power to require the attachment lien to be released befor an adjudication is entered. In re Stevens v. Nave-McCord, supra, Sanborn, J., writing for the court said:

'Such a preferred creditor may present or may join in a petition for an adjudication of bankruptcy. But he may not be counted for the petition unless he surrenders his preference before the adjudication.'

"If an adjudication be had here, the effect would be a dissolution of the attachment obtained and therefore there would be no preference to the petitioning creditor. It is thus obvious that the fact that an attachment was obained here and was not formally vacated by an order of the court at the time of the filing of the petition, did not give a preference and did not incapacitate the petitioner from filing the petition. The advantage, if any, were gained by the writ of attachment, cannot avail the petitioner in the bankruptcy court, and it therefore cannot defeat the right of a creditor having a provable claim of the requisite nature and amount to file a petition in involuntary bankruptcy.

"We find nothing in the Bankruptcy Act itself which forbids a creditor filing a petition under similar circumstances. While the attachment obtained by the respondent remains unvacated of record, this respondent could not secure any advantage by that fact. When the order is entered vacating the attachment, it will be effective as of the date of decision of the court below vacating the same. This was a date before the bankruptcy. Furthermore, the preferred creditor who files a claim may surrender his preference at any

time before the claim is allowed. This he need not do before the filing of the claim. We think the court below committed no error in refusing to dismiss the petition in bankruptcy because of this."

Point IV.

A CREDITOR HOLDING AN UNLIQUIDATED CLAIM IS QUALIFIED TO ACT AS A PETITIONING CREDITOR, AND IT IS NOT NECESSARY THAT THE CLAIM SHOULD FIRST BE LIQUIDATED.

The position of Thornton, assignee of W. W. Lucius, as a creditor is challenged on the ground that his claim is unliquidated. The claim asserted is for several thousand dollars, the reasonable value of services rendered by W. W. Lucius, an architect, in preparation of plans and specifications for the alleged bankrupt in connection with his building operations. It is conceded that Lucius was engaged to prepare plans and specifications and that he did the work. The controversy is over the manner and amount of compensation, Lucius claiming the reasonable value of the services rendered, while the bankrupt claims that there was a special arrangement governing the amount of compensation.

The appellant contends that neither Lucius or Thornton, his assignee, were qualified to act as peti-

tioning creditors prior to the liquidation of this claim. We submit that there is no foundation for this contention and that the law has been definitely settled in this respect by the Supreme Court of the United States.

In Grant Shoe Co. v. Laird Co., 212 U. S. 445, one of the petitioning creditors presented a claim for $3700.00 "for the breach of an express warranty of shoes" sold to the creditor by the alleged bankrupt. It was there contended that the creditor could not be a petitioner until his claim had been liquidated. The District Court made an adjudication which was affirmed by the Circuit Court of Appeals, and on appeal to the Supreme Court of the United States it was held (opinion of Mr. Justice Holmes):

> "Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By Section 59b petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By Section 63b, 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.' The word 'thereafter' shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not yet appear that there is any foundation for the proceeding, in the requisite amount or even the existence of the claim. But there must be a pro-

ceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then since by the express words of the Act it had to be liquidated before it could be proved.

"On the other hand, by the equally express words of Section 63a, among the debts that may be proved are those founded upon a contract express or implied. Again, by Section 17, the discharge is of all 'provable debts' with certain exceptions, and it would not be denied that this claim would be barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 18 Am. B. R. 121. If the argument for the plaintiff in error is sound, a creditor for goods sold on a quantum valebant would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimation in Twindle v. Birkett, sup., and Crawford v. Burke, 195 U. S. 176, 12 Am. B. R. 659, are adverse to such a result. The whole argument from the letter of the statute depends on reading 'provable claims' in Section 59b as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims are of a kind that can be proved in the proceedings, the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of

> the petition to ascertain whether it is filed rightly or not."

Appellant cites in support of his contention the case of Harmony Creamery Company, 18 Fed. 609, but no such case is cited in the place indicated, nor have we been able to find this citation in any other volume.

In Spear v. Gordon, 12 Fed. (2nd) 778, (1st Cir.), the petitioning creditors' claims were unliquidated. The District Court refused to hear evidence in support of the petition and dismissed it on the ground "that the petitioner's claims, though contractual, were not liquidated and therefore they did not qualify as petitioning creditors having provable claims." The Court of Appeals held:

> "In thus ruling the court erred. It should have received the petitioners' evidence and determined the questions arising on the petition. Unliquidated claims arising out of contract are provable within the meaning of the Bankruptcy Act, although damage claims for tort are not. 1 Remington on Bankruptcy, Section 257; Grant Shoe Co. v. Laird Co., 212 U. S. 445, 21 Am. B. R. 484, 29 S. Ct. 332; Clarke v. Rogers (C. C. A., 1st Cir.), 26 Am. B. R. 413, 183 F. 518; Pratt v. Auto Spring Repairer Co. (C. C. A., 1st Cir.), 28 Am. B. R. 483, 196 Fed. 495."

In re Post, 12 Fed. (2nd) 941, affirmed by the Cir-

cuit Court of Appeals without opinion, 12 Fed. (2nd) 942, the right of a creditor holding an unliquidated claim to act as a petitioning creditor was challenged and the court held:

> "The fact that the exact amount is not yet determined is not a bar. Grant Shoe Co. v. Laird, 212 U. S. 445, 21 Am. B. R. 484, 29 S. Ct. 332; Remington on Bankruptcy, Vol. 2, Sec. 811; Williams v. U. S. Fidelity & Casualty Co., 236 U. S. 549, 34 Am. B. R. 181, 35 S. Ct. 289."

Under these authorities there can no longer be any question as to the right of a creditor holding an unliquidated claim arising out of contract to act as a petitioning creditor.

Point V.

PAYMENT TO PETITIONING CREDITORS SUBSEQUENT TO FILING OF THE INVOLUNTARY PETITION WILL NOT DISQUALIFY SUCH CREDITORS AND WILL NOT PRECLUDE AN ADJUDICATION IN BANKRUPTCY.

The involuntary petition was filed September 29, 1929. The petitioning creditors were National Electric Company, D. L. Conley as assignee of Nilsson Wall Paper Company, and Gilbert I. Thornton as assignee of W. W. Lucius. Thereafter two intervening petitions were filed, one by Cress & Company

and the other by Commercial Casualty Insurance Company.

On November 6th the alleged bankrupt attempted to avoid the involuntary petition and intervening petitions by attempting to pay the claims of two of the original creditors, to-wit: National Electric Company and D. L. Conley assignee of Nilsson Wall Paper Company, and Cress & Company, an intervening creditor. In the case of Cress & Company the money was paid to and accepted by the creditor. In the case of D. L. Conley as assignee of Nilsson Wall Paper Company the payment was not made to D. L. Conley, assignee, who was the petitioner, but was made to Nilsson Wall Paper Company, the assignor. In the case of National Electric Company an attempt to make payment was made by delivering the amount of the claim to a clerk in the office of the creditor who had no authority to receive the same or to discharge the obligation or to change the creditor's position as a petitioning creditor. The same day that the money was received by the clerk, when she called it to the attention of the officers of the corporation they promply attempted to return the money to the alleged bankrupt by mailing it to him by registered mail, but the alleged bankrupt refused to receive it and it was returned to the National Electric Company. The money was again forwarded by registered mail and again refused and was returned. The pay-

ment to the assignor in the former instance was not a payment in discharge of the indebtedness which at the time was owned by D. L. Conley, the petitioner; and in the latter case the payment to the clerk who had no authority to receive or accept the same cannot in law constitute a discharge of the obligation to the petitioner; but in any event, even if payment had been made direct to the petitioners and received by them, it would not effect the status of he involuntary and intervening petitions and the court would not be precluded from entering an adjudication thereon.

NONE OF THE THREE CREDITORS REFERRED TO WITHDREW THEIR PETITIONS, NOR DID THEY MAKE ANY APPLICATION FOR LEAVE TO DO SO, NOR WAS ANY APPLICATION MADE TO THE COURT TO DISMISS THE PROCEEDINGS.

Section 59-g of the Bankruptcy Act, now 11 U. C. C. A. § 95-g, provides:

> "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors

> of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

Section 58 of the Bankruptcy Act, now 11 U. S. C. A. § 94, provides:

> "Creditors shall have at least ten days' notice by mail * * of * * * (8) the proposed dismissal of the proceedings."

These two provisions preclude a creditor who has become a petitioner from dismissing or abandoning the proceeding at will. This could only be accomplished by petitioning the court and giving **notice to all of the creditors of the alleged bankrupt,** and this can only be done after the court has required the bankrupt to file a schedule of his creditors with their addresses and has caused notice to be sent to all of the creditors of the application to dismiss or withdraw the proceeding. This provision was obviously intended to preserve the status of the involuntary petition so as to afford other creditors of the alleged bankrupt an opportunity to come in and continue the application for an adjudication so that they may have the benefit of the time of the filing of the original petition. None of the proceedings contemplated by Section 59-g, now 11 U. S. C. A. § 95-g, of the Bankruptcy Act were taken in this case. As the record stood before the court at the time of the hear-

ing before the special master and at the time of the hearing on the exceptions to the report, there was a valid petition with the requisite number of petitioning creditors.

The existence of the requisite number of creditors must be determined as of the date of the filing of the involuntary petition, and if the petitioners were creditors at that time the subsequent conduct of the bankrupt could not destroy their status as petitioning creditors, at least not without complying with the provisions of the act referred to above.

In Ward v. Lowery, 295 Fed. 60, (5th Cir.) (Certiorari denied in the Supreme Court), an alleged bankrupt paid off a creditor after the petition was filed and then by answer set up that fact as a bar to the adjudicaion. (Same was done in this case.) The court sustained motions to strike out this answer and later made an adjudication, notwithstanding the fact that one of the three creditors had been paid. The Circuit Court of Appeals held:

> "The court's memorandum opinion shows that it found that the Magnolia Petroleum Company still appears on the court records as one of the original petitioning creditors, and that the court concluded that the mere fact of the payment as alleged of the debt owing to that petitioner did not constitute an elimination of that petitioner as a party. So far as appears, no application was made

for leave for the Magnolia Petroleum Company to withdraw as a petitioner. Amended section 59-g of the Bankruptcy Act provided:

(Here court quotes Sec. 59-g.)

While this provision does not deal with the subject of a withdrawal by a petitioning creditor, it shows that action by one such creditor vitally affecting the proceedings involves rights therein of his co-petitioners and other creditors, and that it is a function of the court to protect those rights from impairment by such action without creditors not participating therein having an opportunity to be heard in regard thereto. To say the least, it is doubtful whether one of several petitioning creditors properly could be permitted to withdraw without notice to his co-petitioners and other creditors, or whether a permitted withdrawal of one of several petitionnig creditors on the sole ground that the debt to him was paid or satisfied after the petition was filed could have the effect of depriving his co-petitioners of the right to prosecute the petition to an adjudication. In re San Jose Baking Co. (D. C., Cal.), 36 Am. B. R. 635, 232 Fed. 200; In re Beddingfield (D. C., Ga.), 2 Am. B. R. 355, 96 Fed. 190. However that may be, we are not of opinion that the power of the court to proceed to an adjudication is destroyed by the alleged bankrupt paying, after the filing of the petition, the debt owing to one of several petitioning creditors. It is incompatible with the rights acquired by the other petitioning

> crediors by their joining in the petition for the alleged bankrupt to have the power, without notice to such creditors or action by the court, to halt the proceeding or deprive it of life by reason of paying or satisfying, after the filing of the petition, the debt owing to one of the petitioning crediors."

In re Bedingfield, 96 Fed. 190, (U. S. D. C., Ga.), three creditors filed an involuntary petition and soon after the petition was filed one of the creditors, Carlton & Smith, gave notice that they desired to withdraw from the proceeding. About an hour before the petition was filed but after it was executed, this creditor transferred the claim to the firm of Fain & Stamps in the interest of Kelly Bros., a creditor who had obtained a preference. The Court held:

> "The question is whether or not this withdrawal should be allowed. It seems to me that it would be very bad practice to countenance such a transaction. If creditors having, as in this case, a number of small claims, amounting to something over $500, join in a petition for involuntary bankruptcy, where there has been a transfer of property and a preference in violation of the Bankrupt Act, and one of the petitioning creditors can withdraw in order to reduce the amount of the petitioning creditors' debts below $500, it would open the way for debtors giving such a preference, and the person preferred to settle with a portion of the creditors, and thereby de-

feat the proceeding, however palpable the preference might be. The Bankrupt Act has an express provision against any such proceeding. Sec. 59, cl. g. is as follows: 'A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.' Where a creditor joins in a proceeding in involuntary bankruptcy, and allows the petition to be filed, and afterwards obtains a settlement in some way, it is too late to withdraw from the proceeding in the way attempted here. On the face of the papers, this is a clear preference of one creditor. It appears that the entire property of Bedingfield was transferred to one creditor for an antecedent debt, leaving nothing whatever to the other creditors. If, by the aid of third parties, the debt of one of the creditors can be brought up, so as to reduce the amount below $500, it will enable the debtor to protect his preference, and defeat the whole purpose of the Bankrupt Act."

In re San Jose Baking Co., 232 Fed. 200, (U. S. D. C., Northern District of California), Judge Dooling held:

"It is not within the power of a creditor who joins in good faith in a petition to have his debtor adjudged a bankrupt thereafter to withdraw from such petition, and prevent the matter from proceeding, so long as any of the petitioning creditors insist that the matter do proceed. It is doubt-

ful whether such petitioning creditor may withdraw in any event without leave of court so to do. Any other rule would leave the door open for the perpetration of fraud, and the surreptitious bargaining between the debtor and petitioning creditors in an effort to procure the withdrawal of a sufficient number of the latter to reduce the amount of claims or the number of creditors below the requirements of the statute. The Court cannot inquire into the good faith of every attempted withdrawal, nor indeed is there any way to prove the secret bargainings between debtor and creditors, and the only way to prevent them is to hold such attempted withdrawals to be ineffectual so long as any of the petitioning creditors desire in good faith to prosecute their petition to an adjudication."

The foregoing authorities clearly support our contention that it was not within the power of the alleged bankrupt by making payments subsequent to the filing of the petition to destroy the status of the petitioners as creditors, nor was it within the power of the creditors themselves to withdraw or abandon or dismiss the proceedings without leave of court and compliance with the provisions of the Act. Hence the payment or the attempt to pay the creditors referred to was inoperative to destroy the involuntary petition.

Point VI.

GENERAL ORDER NO. 5 DOES NOT PRECLUDE ASSIGNEES THORNTON AND CONLEY FROM BEING PETITIONING CREDITORS IN THIS CASE.

It is contended that the petitioning creditors, D. L. Conley and Gilbert L. Thornton, are disqualified from being petitioning creditors because they are both assignees, that they purchased the claims for the purpose of becoming petitioning creditors, and that they have not complied with the provisions of General Order No. 5 as amended in 1926.

THORNTON CLAIM

Thornton was an assignee for collection. W. W. Lucius assigned his claim against Reed to Thornton about the first of July, 1929, for the purpose of enforcing payment of the claim. Out of the proceeds Thornton was to pay $750.00 to the National Electric Company in settlement of indebtedness from W. W. Lucius to National Electric Company on a note. The balance, after deducting the expense of the litigation, was to be turned over to W. W. Lucius. The assignment was made before any bankruptcy petition was contemplated and an action was commenced in the state court by Thornton as assignee

on the Lucius claim. It was while this action was pending that Thornton learned that Reed was transferring all of his assets to defraud his creditors. He thereupon abandoned the state court action and became a petitioning creditor in this proceeding.

In compliance with the requirements of General Order No. 5 there was attached to the amended involuntary petition an affidavit by Thornton setting forth the manner in which the assignment was made and the reason therefor, and among other things sets forth in his affidavit:

> "that the said claim was not purchased by me or assigned to me for the purpose of instituting bankruptcy proceedings; that at the time of the assignment of the claim to me no bankruptcy proceedings were contemplated and it was made for the purpose of instituting an action in the state court to enforce payment of the claim; that I became a petitioning creditor after the said action was instituted upon learning that the alleged bankrupt had transferred all of his property with intent to hinder, delay and defraud his creditors."

There is also attached to the amended involuntary petition the original assignment of the claim executed by W. W. Lucius to Thornton on October 31, 1929, which recites:

> "That this written assignment is made to confirm the oral assignment of the above described claim made by me to Mr. Thornton on or about the first day of July, 1929."

There is also attached to the amended involuntary petition an affidavit of Lucius, the assignor, which sets forth that he made the assignment of his claim to Thornton prior to July 16, 1929, that the assignment was for the purpose of collecting the amount due on the claim, and he swears on oath that the allegations of fact made by Thornton in his affidavit are true.

These affidavits and assignment attached to the involuntary petition clearly constitue a compliance with the requirements of General Order No. 5.

Finding of Fact No. V, made by the special master and approved and confirmed by the district judge, finds the facts in accordance with the affidavits referred to above, and finds specifically:

> "That the said assignment to Gilbert L. Thornton was made in good faith and without any oppressive intent or purpose, but was made with the bona fide intention and purpose of enabling Thornton to realize upon the claim of Lucius against Reed and out of the proceeds to liquidate the indebtedness of Lucius on the aforesaid note."

CONLEY CLAIM

Conley, one of the petitioning creditors, is an assignee of a claim of Nilsson Wall Paper Company. Attached to the amended involuntary petition is the original assignment of the claim showing that the assignment was made on September 28, 1929.

There is also attached to the amended involuntary petition an affidavit by D. L. Conley, the assignee, reciting,

> "That I purchased the aforesaid claim from the Nilsson Wall Paper Company and agreed to pay therefor the sum of One Hundred Ten Dollars ($110.00), and I am now the legal and beneficial owner of the said claim of Nilsson Wall Paper Company against George E. Reed; that this agreement to pay the sum of One Hundred Ten Dollars ($110.00) is the true and sole consideration for the assignment and transfer of said claim; that I am the bona fide holder and legal and beneficial owner of the said claim.
>
> "That the said claim was purchased by me at the request and suggestion of Commercial Casualty Company for the purpose of qualifying me as a petitioning creditor in this bankruptcy proceedings."

Finding of Fact No. IV, made by the special master and confirmed by the district judge, finds that

Conley was the owner of the claim and was the owner at the time the findings were made:

> "That the said assignment was made for a valuable consideration, to-wit, the agreement of D. L. Conley to pay to Nilsson Wall Paper Company the sum of $110.00 for said claim; that the purchase of said claim by D. L. Conley was made in good faith and without any fraudulent or oppressive purpose or intent, but was purchased by the said Conley at the request of the Commercial Casualty Insurance Company, a creditor of the alleged bankrupt, who was interested in securing an equitable distribution of the bankrupt's property among his creditors."

General Order No. 5, as amended in 1926, provides as follows:

> "Petitioners in involuntary proceedings whose claims rest upon assignment or transfer from other persons, shall annex to one of the duplicate petitions all instruments of assignment or transfer and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings."

This General Order does not require that there should be any actual consideration for an assign-

ment of a claim, or that the consideration should be of any particular character, or that it should be adequate. All that the Order requires is that the facts respecting the consideration be set forth. It does not attempt to provide that in order for an assignee to be a pe a petitioning creditor he must have paid valuable or other consideration for the assignment. It does not attempt to change the law as fixed by the Bankruptcy Act and interpreted by decisions governing governing the right of assignees to be petitioning creditors as the law existed at the time the General Order was adopted.

The General Order requires the affidavit to state that the petitioner is a bona fide holder and legal and beneficial owner of the claim. The affidavits of Thornton and Conley both contain these allegations, and they are as a matter of law the legal and beneficial owners of the claims.

The position of an assignee of a claim for collection, or the assignee of a claim which he holds as security, must be determined according to the law of the state in which the petition is filed. In the State of Oregon an assignment of a claim as security or for collection constitutes the assignee a bona fide holder and the legal and beneficial owner of the claim and entitled under the law of the State of Oregon to sue in his own name.

In Haviland v. Johnson, 70 Ore. 85, the Court held:

> "An assignment of a claim for the purpose of collection is based upon a valuable consideration, and is sufficient."

In French & Co. v. Haltenhoff, 73 Ore. 247, the Court held:

> "The assignee of a chose in action may sue thereon in his own name, and a consideration for the assignment need not be proved."

In Collins v. Heckart, 127 Ore. 43, the Court held:

> "It has been held by this court that the assignee of a chose in action may maintain an action thereon in his own name although he may have paid no consideration therefor. Among the decisions, see Gregoire v. Rourke, 28 Ore. 275, (42 Pac. 996); Haviland v. Johnson, 70 Ore. 83 (139 Pac. 720)."

In Levins v. Stark, 57 Ore. 189, the Court held:

> "Any declaration, either in writing or by word of mouth, that a transfer is intended, will be effectual, providing it amounts to an appropriation to the assignee."

In Hackett Digger v. Carlson, 127 Ore. 386, the Court held that an unliquidated claim arising out of contract may be assigned.

The last clause of General Order No. 5 requires the affidavit to state

> "whether or not they were purchased for the purpose of instituting bankruptcy proceedings."

It merely requires the petitioner to state the facts in respect thereto. It does not require that they should make an affirmative showing that the claim was not purchased for that purpose. Neither does the General Order provide that if the claim was purchased for such a purpose that the petitioner would be disqualified. The Supreme Court in framing this requirement merely intended that the facts surrounding assignments of claims should be presented to the court, but **it imposed no penalties, nor did it attempt to create any disqualifications** nor in any other manner attempt to change the law governing the right and status of assignees to be petitioners. Indeed, if the Supreme Court had attempted by rule to change the law governing the right and status of assignees to be petitioning creditors the rule would be inoperative, for the power to make rules is limited to the procedure for carrying the Bankruptcy Act into effect.

Section 30 of the Bankruptcy Act, now 11 U. S. C. A § 53, confers power to adopt General Orders in the following language:

> "All necessary rules, forms and orders as to **procedure** and **for carrying this act into force and**

effect shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

Of course, any rule which would attempt to change the law with respect to the rights and status of assignees of claims would be he exercise of power in excess of that conferred by the foregoing section of the Bankruptcy Act, and any rule which could deny to an assignee of a claim the position of a creditor within the meaning of Section 59, of the Act, 11 U. S. C. A. § 95, would not be a provision dealing with procedure or for carrying the Act into effect.

In Meek v. Centre County Banking Co., 268 U. S. 426, the Supreme Court invalidated its own General Order No. 8 because it exceeded the rule-making power in that it attempted to deal with substantive law. The cour held:

> "The authority conferred upon this court by Section 30 of the Bankruptcy Act (Comp. St. Sec. 9614) to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. West Co. v. Lea, 174 U. S. 590, 599, 19 S. Ct. 836, 43 L. Ed. 1098. And see Orcutt Co. v. Green ,204 U. S. 96, 102, 27 S. Ct. 195, 51 L. Ed. 390."

In re City Contracting & Bldg. Co., 30 A. B. R. 133, no Federal citation, in a lengthy discussion of the application of General Orders, the Court held:

> "So far as concerns any power to make rules, derived from Section 2, Clause 15, of the Act, 30 Stat. 547, as a basis for the possible wide scope of this General Order, it is to be observed that **the power to make rules is not the power to legislate; rules may enforce the statute but not enlarge it.** And so far as concerns any policy of liberal construction to effect the remedial purpose of the act, it is not to be overlooked that to construe liberally is not to read into the statute something which its own erms do not clearly express or imply."

If the last sentence of General Order No. 5, which requires the assignee to state in his affidavit "whether or not they were purchased for the purpose of instituting bankruptcy proceedings" should be construed as a limitation upon the class of persons who may be petitioning creditors, the General Order would be void because it would be adding a substantive provision of law to the Act and would constitute legislation, because the law as it existed at the time the rule was adoped did not preclude an assignee from becoming a petitioning creditor on the ground that he purchased the claim for that purpose.

It is an elementary rule of construction of sta-

tutes and rules that if two constructions can be indulged in—one which would render it void and the other which would be consistent with its validity, the latter construction will be adopted, and the General Order can be and should be construed so that it will not be held to be a violation of Section 30 of the Bankruptcy Act. The amendment of General Order No. 5, resulting in the addition of the clause referred to, was the result of abuses which had sprung up in the bankruptcy practice. One was the practice of collection agencies and attorneys who went about purchasing claims against business concerns which were in precarious financial condition, for the express purpose of throwing the concern into bankruptcy and thereby creating an estate for administration which would be a source of revenue to them. Another abuse was the practice of corporations that made a business of acquiring claims against business concerns that were in precarious condition for the purpose of throwing them into bankruptcy so that they could be liquidated and reorganized and the acquired by such corporations. **Lowenstein v. McShane, 130 Fed. 1007,** is a case which illustrates the vices aimed at by the amendment to the General Order No. 5. These are instances of parties who are not creditors of the alleged bankrupt and had no interest in its affairs or its liquidation other than the satisfaction of selfish interest, and the acquiring of claims for that purpose was indeed a species of champerty, being in effect the

purchase of litigation.

But the courts have always approved the activity of creditors who are interested in the estate of an insolvent debtor to obtain petitioning creditors by solicitation or through the purchase of claims so that the insolvent debtor could be edjudicated a bankrupt and in that way preserve the estate for the equitable distribution among all of the creditors. It is frequently necessary in order to avoid fraudulent transfer and dissipation of assets, for one creditor to go out and solicit other creditors to join in the petition, or where necessary to cause a claim to be purchased to obtain the necessary number of petitioning creditors. In such cases the purpose is legitimate. It is not a vicious attempt to throw into bankruptcy a concern in which the purchasers of claims have no interest other than the creation of a source of revenue for themselves. In the cases where creditors themselves are active to obtain the requisite petitioning creditors it is done for an honest and lawful purpose of bringing into the bankruptcy court the assets of the insolvent debtor for equitable distribution and to make available to all creditors the machinery of the bankruptcy court to recover such assets as have already been fraudulently disposed of. In such case the creditor who engages in the activity of obtaining an adjudication in bankruptcy by causing claims to be purchased gains no special advantage for himself.

Whatever advantage such creditor gains is one that is available to all of the creditors and for the benefit of all of the creditors. That is precisely the situation in the case at bar with respect to the Conley claim. The Thornton claim was not purchased with any idea of a petition in bankruptcy being filed. In fact, he started an action in the state court upon his assigned claim, and it was only after he learned of the dissipation of the debtor's assets that he became a petitioning creditor. The Conley claim was purchased from the Nilsson Wall Paper Company with the purpose in view of qualifying as a petitioning creditor. The Commercial Casualty Insurance Company, who was itself a creditor of the alleged bankrupt, suggested and requested Conley to purchase this claim. The court has found as a fact (Finding No. IV):

> "That the purchase of said claim by D. L. Conley was made in good faith and without any fraudulent or oppressive purpose or intent, but was purchased by the said Conley at the request of the Commercial Casualty Insurance Company, a creditor of the alleged bankrupt, who was interested in securing an equitable distribution of the bankrupt's property among his creditors."

This finding of fact removes any question of the good faith of Conley in purchasing the claim, or of Commercial Casualty Insurance Company in suggesting and requesting Conley to purchase the same for

the purpose of becoming a petitioning creditor. The Commercial Casualty Insurance Company, which requested Conley to purchase the claim and become a petitioning creditor, was vitally interested in Reed's activity and property, for it had written a surety company bond guaranteeing the performance of a contract. It had become liable for a large indebtedness, the exact amount of which was at the time unknown. Many claims by mechanics and materialmen had been asserted against Reed and the holder of bond was in turn asserting claim on the bond against the casualty company. Reed was liable to the insurance company on his indemnity agreement.

The amendment of the General Order No. 5 was sponsored by the American Bar Association, and in the reports of the American Bar Association, 1925, page 492, in discussing the reasons for the adoption of the amendments and their operation, the report says:

> "The amendment does not provide for the consequences of a failure to comply with its beconstruction in the interest of justice and fairhests, but this will afford a subject for judicial play." (Reports of Am. Bar Ass'n., 1925, p. 492.)

In other words, the amendment was sponsored and adopted upon the theory that when an assignee of a claim is a petitioning creditor he should present to the court at the very threshold of the proceeding the

facts surrounding the purchase and the acquirement of the claim so that the court could at the very inception of the proceeding inquire into and determine whether the purchase of the claim was for a lawful and legitimate and equitable purpose or whether it was done for a champertous or oppressive purpose. If the former, the right of the assignee to be a petitioning creditor must be recognized under the law as it existed at the time of the adoption of the rule, and if the latter be found to be the case then the court in the exercise of its general equity powers has the right to reject the petition of an assignee which was found to be based upon a claim purchased for champertous or oppressive purposes. But there is nothing in the General Order which warrants the construction that the mere fact that an assignee purchased the claim for the purpose of becoming a petitioning creditor would of itself disqualify him as such. To give the rule such a construction would be legislaion by the Supreme Court and hence void.

Un der the General Order the question of the good faith of the assignment and the purchase of claims becomes a question of fact if an issue is raised by answer to the petition. Such an issue of fact was raised in this case and the findings of the special master and the district court are supported by evidence.

We submit that where a creditor ascertains that a debtor has fraudulently conveyed his property so

as to hinder, delay and defraud his creditors and is insolvent, that it is lawful and proper and commendable for such a creditor to do all in his power to bring that property back into the estate of the debtor so as to make it available for distribution to all of his creditors, and that can only be accomplished by the machinery provided for by the Bankruptcy Act. If it is necessary to accomplish that purpose we can see no impropriety, or the violation of any standard of good faith, for such a creditor to induce other creditors to join in an involuntary petition. If he is unable to persuade another creditor to become a petitioner, due to the creditor's reluctance or other reasons, we can see no impopriety in advising and requesting someone else to purchase the claim of the reluctant creditor and thus become a petitioning creditor.

When a creditor who is qualified to become a petitioner sells and assigns his claim he sells it with all of the rights and remedies which the law affords him. This includes the right to become a petitioning creditor, and this right passes to the assignee. The fact that the creditor may see fit not to exercise that right himself does not deprive him of the right, and if he sells his claim the right goes with it

Prior to the adoption of General Order No. 5 the right of an assignee to be a petitioning creditor was

well established. An assignee was accorded all of the rights of an assignor, and the right to be a petitioning creditor was determined as of the date when the indebtedness accrued and not as of the date of the assignment. There is no amendment to the Act nor any line of decission subsequent to the adoption of General Order No. 5 which in any way changes the law in this respect.

Section 59 (b), 11 U. S. C. A. § 95 (b), provides:

> "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

This section which provides who may be petitioning creditors merely imposes the qualification that the petitioner must be a creditor having a provable claim. No other qualification or limitation is imposed.

Section 1 (9), of the Bankruptcy Act, 11 U. S. C. A. § 1-(9), provides:

> "'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney,

or proxy."

Section 1 (11), 11 U. S. C. A. § 1-(11), provides:

> "'Debt shall include any debt, demand, or claim provable in bankruptcy."

One who is an assignee of a claim for collection clearly comes within the provisions of Section 1 (9), for he may be said to be a duly authorized agent; and one who has purchased a claim for a consideration is himself a creditor under the same subdivision.

In re Bevins, 165 Fed. 434, (C. C. A., 2nd Cir.), an involuntary petition was filed against Bevins by Becker & Company, Goetz and Fisher. The alleged bankrupt denied that there were three creditors and alleged that Goetz and Fisher bought claims against the alleged bankrupt for $40.00 and $16.00 respectively, "for and with the funds of Becker & Company." The District Court referred the issues to a special master who reported in favor of adjudication. On appeal to the Circuit Court of Appeals the Court held:

> "We follow the finding of the master and of the district judge that Fisher and Goetz were the real owners of the claims purchased by them against the alleged bankrupts and that therefore the requirement of Section 59b of the Bankrupt Act that there should be three petitioning creditors, is satisfied.
>
> "The right to purchase claims in order to

make up the necessary number of petitioning creditors was upheld under the Act of 1867 in re Woodford (Fed. Cas. No. 17,972, 13 N. B. R. 575).

"The claim of Becker & Company was provable when the petition was filed and as the petitioning creditors then represented an indebtedness over $500, the requirements of Section 59b were satisfied in this respect also. In re Hornstein (10 A. B. R. 308, 122 Fed. 266; in re Mertens, 16 A. B. R. 825, 147 Fed. 177."

In the following cases it was held that an assignee may be a petitioning creditor irrespective of the purpose of the assignment.

Re Page Motor Car Co., 251 Fed. 318.
In re Veller, 249 Fed. 633, (C. C. A., 6th Cir.)
Re Halsey El. Gen. Co., 163 Fed. 118.
Re Hanyan, 180 Fed. 498, affirmed by C. C. A. 2nd Cir., on opinion of Dist. Ct. 181 Fed. 1021.
Leighton v. Kennedy, 129 Fed. 737, (C. C. A., 1st Cir.)

In re Automatic Typewriter Co., 271 Fed. 1, (C. C. A. 2nd Cid.), the Court held:

"The fourth defense pleads that the alleged bankrupt's involuntary petition in bankruptcy was not filed in good faith, but was filed vexatiously and maliciously for the sinister, selfish

and ulterior purpose of defeating the claim of the cause of action set forth in the counterclaim of the revising petitioner. If it be proved by competent evidence that the banrupt is insolvent and committed acts of bankruptcy and the other necessary jurisdictional facts are present, an adjudication in bankruptcy will follow therefrom, and what reasons or motives inspired or instigated the proceedings, are of no importance and will not defeat an adjudication. It is the right of action which is evidenced by facts alleged and proven that must prevail; whatever may be the motive it will not support or defeat the cause of action."

The cases clearly establish that an assignee who purchased a claim for the purpose of becoming a petitioning creditor is not disqualified, and the General Order No. 5 does not disqualify but merely requires the court to investigate the good faith of the transaction at the outset of the proceeding for the purpose of avoiding the abuses illustrated by the case of Lowenstein v. McShane, supra.

CASES CITED BY APPELLANT

Appellant cites the case of **Stroheim v. Perry** several times throughout his brief. In this case a holder of several notes made by the alleged bankrupt assigned one of the notes without any consideration to an nominal party for the purpose of qualifying him

as a petitioning creditor. It was a typical case of splitting up a claim for the purpose of creating several petitioning creditors, a practice which has always been condemned. In the case at bar we have no such situation.

Trammel v. Yarbrough, cited several times throughout the brief and particularly in support of the proposition that as to intervening creditors the four month period is to be computed to the date of the filing of the intervening petition and not as of the date of the filing of the original petition, and by this species of computation appellant arrives at the conclusion that the transfers were made more than four months prior to the filing of the petition in bankruptcy. The case does not support any such doctrine. In that case the original petition was dismissed after a hearing. Thereafter other creditors attempted to reopen the case to enable them to intervene. The court held that if they were permitted to do so the four months period would have to be computed from the date that the intervening petitions were filed. That was expressly predicated upon the ground that the original petition had been dismissed and there was no proceeding to which they could become a party so as to keep alive the proceedings from their inception. The language of the case clearly indicates that had an intervening petition been filed prior to the dismissal of the proceedings that they would have

been treated as having been filed as of the date of the original petition.

CONCLUSION

The record discloses a palpable scheme on the part of the alleged bankrupt to cheat his creditors. He conveyed away every bit of property that he had—some of it directly and some of it through the medium of a corporation which was a mere sham. The result of these conveyances was to leave him stripped of every asset, according to his own admission. The court has found these conveyances to be palpably fraudulent. The most important asset of them all we find in the hands of his lawyer who now represents him in these proceedings. As soon as he has parted with all of his property he immediately burns and destroys all of his records, notwithstanding the fact that claims were being asserted and liens were being filed, and he now seeks by the interposition of numerous objections to frustrate an attempt to undo as far as the Bankruptcy Act makes it possible the mischief he has done. When these bankruptcy proceedings were instituted and the issues were about to be tried he makes an attempt to frustrate these proceedings by paying off some of he petitioning creditors in an attempt to disqualify them as petitioners. The whole course of conduct of the alleged bankrupt is one that cannot be too severely condemned. We submit that he should not be permitted

to escape by stretching the rules of interpretation of the Bankruptcy Act and General Orders to the breaking point to make available to the alleged bankrupt the technical objections which he has interposed.

The special master had before him all of the witneses; he heard their testimony and observed their demeanor. A great deal of testimony was taken and he made findings of fact supporting every requirement to sustain the petition. The matter was reviewed by Honorable Robert S. Bean, Judge of the District Court, upon exceptions to the special master's report, and he overruled the exceptions and confirmed the report and ordered an adjudication after a lengthy hearing and thorough examination of the case, and we respectfully submit that these findings and conclusions of law should be sustained.

Respectfully submitted,

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